Supreme Court, U.S.
FILED

10-77 JUL 12 2010

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No. 10-

IN THE

Supreme Court of the United States

MICHAEL WILLIAMSON,

Petitioner,

v.

ADVENTIST HEALTH SYSTEM/SUNBELT, INC., SOUTHWEST VOLUSIA HEALTHCARE CORPORATION D/B/A FLORIDA HOSPITAL FISH MEMORIAL, MEMORIAL HEALTH SYSTEMS, INC. D/B/A FLORIDA HOSPITAL - OCEANSIDE, AND MEDICAL STAFFING NETWORK, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Eleventh Circuit affirmed the district court's final order of summary judgment determining that ethnic comments and slurs made at the time of a termination was not direct evidence of racial discriminiation in an employment termination situation. The Eleventh Circuit's decision conflicts with the decisions of the Supreme Court and the Fourth and Seventh Circuit Courts of Appeal.

One question is presented in this petition:

I. **WHAT LEVEL OF PROOF OF RACIAL ANIMUS IS REQUIRED TO CREATE DIRECT EVIDENCE OF A TRIABLE ISSUE OF FACT SUFFICIENT TO PRECLUDE ENTRY OF AN ADVERSE SUMMARY JUDGMENT AS TO A CLAIM OF RACIAL DISCRIMINATION IN THE WORKPLACE WHEN THE EMPLOYER UTILIZES OBVIOUS AND BLATANT RACIAL AND NATIONAL ORIGIN SLURS AT THE TIME OF AN EMPLOYMENT TERMINATION.**

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit was not selected for publication in the Federal Reporter. The opinion is reported as a slip copy at 2010 WL1444574 (C.A. 11, FL). The Eleventh Circuit affirmed the decision of the United States District Court in and for the Middle District Florida, Orlando Division.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The decision of the United States Court of Appeals for the Eleventh Circuit was rendered on April 13, 2010.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 42 United States Code, Section 1981.

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

Title 42 United States Code, Section 2000(e)(2).

(a) Employer practices

It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

1. **Statement of the Facts**. Petitioner Michael Williamson asserts race discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.S. §§ 2000e-2(a)(1) and violations of 42 U.S.C. § 1981. Williamson is a Jamaican-born black male. The core basis of Williamson's claims is that while he was employed as a contract/temporary nurse at Fish Memorial and Oceanside he was subjected to a hostile work environment, discrimination and racially motivated termination. Williamson was employed by MSN, a staffing company/employment agency that assigned Williamson to local hospitals to provide nursing services on a contract or temporary basis solely in the capacity as a LPN. In June 2006, MSN assigned Williamson to the "Florida Hospital" system, which is comprised in part by Fish Memorial and Oceanside hospitals. Respondent Adventist is the parent company of Respondents Fish Memorial and Oceanside.

In June 2006, MSN assigned Williamson to a shift at Oceanside. At that time, a white male nurse suggested

to the charge nurse who supervised and assigned duties for nurses on the hospital floor that she should assign Williamson the duties of a Patient Care Technician ("PCT"). PCT duties consisted of duties including bathing patients, taking out trash, and other essentially janitorial duties. At that time, the charge nurse acknowledged the policy of Oceanside and MSN was not to assign a MSN temporary nursing employee to PCT duties. Williamson reported this incident to MSN, but MSN told him to "not get upset" and "just blow it off". On July 3, 2006, when Williamson reported to Oceanside for a scheduled shift. The charge nurse assigned Williamson to PCT duties. Williamson refused to perform the PCT duties.

The charge nurse stormed into a room, called all of the staff into the room, and complained about Williamson. Williamson heard the charge nurse cursing. The charge nurse had a telephone conversation with the MSN supervisor regarding Williamson's assignment. Immediately after that phone conversation, the charge nurse saw Williamson approaching with a piece of paper. The charge nurse cursed at Williamson and said ". . . Get out of here, I'm not signing nothing, you stupid nigger . . .". Williamson left Oceanside and reported the incident to MSN. MSN called Williamson and told him that Oceanside canceled his remaining assignments to the hospital.

MSN assigned Williamson to Fish Memorial in June, 2006. When Williamson came on duty for shifts, a white female supervising charge nurse made ethnic statements about Williamson coming to the United States on a "banana boat" and referred to him in terms

such as "Hey, Mon". There were more than three (3) occasions where the charge nurse made these comments.

The supervisor also denied Williamson access to the hospital computer system. Williamson was the only nurse that was not allowed access to the computer to access patient information; all other agency or temporary nurses were allowed access to the computers. Williamson complained to MSN about the lack of computer access, but MSN took no action.

The charge nurse at Fish Memorial repeatedly critiqued Williamson's performance by telling Williamson that he was "too meticulous" in his documenting of events and treatment on patients' charts. The charge nurse also told Williamson that he should wait to document events at the end of his shift. This was improper nursing protocol according to nursing licensure requirements; Williamson informed the charge nurse of his concerns.

While working at Fish Memorial, Williamson became aware that a doctor ordered that a terminally ill patient receive a narcotic every 30 minutes. Fish Memorial staff instructed Williamson to increase the narcotic by "pushing" it through the IV. Williamson refused because he knew that he had no authority to deviate from a doctor's orders. Williamson documented that nurses at Fish Memorial recorded on a patient's chart that the patient's prosthetic eye was reacting to light tests, which Williamson knew was impossible. Also Williamson discovered that a nurse failed to give a medication ordered by a doctor and pointed this out to the

supervisor. On July 21, 2006 at a meeting with the supervisor, the supervisor asked Williamson to falsify a flow sheet to reflect services for a patient that had not been provided. Williamson refused.

During his shift on July 26, 2006, Williamson discovered that a white nurse from the Emergency Room left a tourniquet on a patient's arm for over 4 and ½ hours, causing a serious risk to the patient's health. Williamson documented the error and pointed it out to several nurses, including his supervising nurse. An incident report was prepared.

On July 26, 2006, Williamson worked at Fish Memorial for the evening shift. A local physician issued orders changing the medication for a patient to lovenox. Williamson received the order and took it to his supervising nurse who initialed it. Williamson faxed the request to Fish Memorial pharmacy and called the pharmacy. Williamson checked the medication cart, but the pharmacy had not provided the medication. Williamson spoke to someone at the pharmacy 3 to 4 times. Williamson continually told his supervisor that the lovenox was not delivered and documented his efforts in the patient's records and chart. Williamson continued to fax the request for lovenox to the pharmacy even though the pharmacy closed at 11:00 p.m. Ultimately, the supervising nurse then told him to wait until the morning and that she would take responsibility for contacting the doctor to notify him that the hospital pharmacy had not delivered the lovenox.

After Williamson finished his shift and left, MSN called him and stated that Fish Memorial would not "hire

[him] or use [him] period." Williamson prepared letters for both MSN and Fish Memorial and explained the facts and circumstances and faxed the letters to the facilities. Williamson went to Fish Memorial and overheard the charge nurse on the telephone say "That Jamaican boy, who [does] he think he is better than the nurses." Williamson did not receive any further work from MSN after July 26, 2006.

The supervising nurse was not discharged or disciplined for her actions in failing to ensure that the pharmacy delivered the medication. The pharmacy staff was not disciplined. The white female RN in the Emergency Room on July 26 that left the tourniquet on a patient for 4 and ½ hours was not disciplined. No white employees were disciplined or discharged. Williamson told the E.E.O.C. about the incident at Oceanside. The E.E.O.C. prepared the form and sent it to Williamson with the typed language. The E.E.O.C. told Williamson that a claim against Florida Hospital covered both Oceanside and Fish Memorial. The Charge of Discrimination prepared by the E.E.O.C. states that Williamson claimed he was discriminated against on July 3, 2006.

On November 26, 2006, Williamson sent a letter to the E.E.O.C. wherein Williamson specifically outlined the July 3, 2006 incident at Oceanside. Finally, in its May 9, 2007 statement to the E.E.O.C., Fish Memorial's counsel noted that ". . . In the Charging Party's charge of discrimination he makes the vague and bare assertion that he was allegedly harassed on July 3, 2006 and again on July 27, 2006. . . ."

The facts of record before the district court showed that for nearly five (5) years Williamson performed satisfactorily as a contract LPN for MSN in South Florida and Central Florida. During only five shifts at Oceanside, Williamson was targeted to perform janitorial services and called a "stupid nigger" by his supervisor as she was firing him. Over approximately 18 shifts at Fish Memorial, Williamson was: (a) singled out as the only nurse who had no access to view the hospital computer system; (b) was not given- a password to the computer system; (c) repeatedly was referred to as "Mon" and asked if he came over on a "banana boat" by his supervisor; (d) called a "Jamaican boy" by his supervisor; and (e) wrongly terminated for the wrongful actions of a white RN and the Fish Memorial pharmacy. These facts, when taken as true and with all inferences in favor of Williamson, constitute evidence that a reasonable jury could rely upon in determining that racial discrimination was a motivating factor in Williamson's termination.

The district court ruled that the ethnic remarks were "jokes" and not direct evidence of racial discrimination. The district court failed to address the obvious derogatory racial epithet of "stupid nigger" and "boy". As to the use of the racial epithet "nigger" at Oceanside, the Eleventh Circuit held that the single use of a racial epithet "nigger" was separate in time from the employment decision challenged and, therefore, did not constitute direct evidence of discrimination. As to the ethnic/national origin remarks, the Eleventh Circuit determined that even if they were deemed to be racial they were not direct evidence of discrimination.

Adventist is the controlling interest owner of both Oceanside and Fish Memorial. Williamson argued that both Adventist and MSN had a duty to investigate Williamson's claims of discrimination and to not rely on the recommendations of Oceanside or Fish Memorial without conducting an investigation. Under the cat's paw theory of liability, Adventist and MSN are both liable for the actions of Oceanside and Fish Memorial. The trial court determined that Adventist and MSN were not liable for the racially discriminatory acts of either Oceanside or Fish Memorial. The Eleventh Circuit affirmed the ruling of now liability for MSN because Williamson allegedly had not carried a prima facie case of discrimination.

The district court ruled that Williamson failed to exhaust his administrative remedies as to Oceanside. Williamson notified the E.E.O.C. representatives of the discriminatory acts of Oceanside. The E.E.O.C. representative filled out the necessary forms on behalf of Williamson and orally instructed Williamson that he did not need separate claims. Williamson justifiably relied on the E.E.O.C. in perfecting his claims. Also, the district court materially erred in entering summary judgment as to Oceanside or Fish Memorial because disputed material facts exist as to whether direct or circumstantial evidence of racial discrimination exist of record.

2. **Procedural Statement**. Williamson filed a complaint asserting racial discrimination in the workplace and interference with his right to make and enforce contracts pursuant to 42. U.S.C. § 1981. On June 18, 2009, the district court granted summary judgment

on behalf of each respondent. Williamson filed a timely Notice of Appeal on June 6, 2009. On April 13, 2010, the Eleventh Circuit rendered its opinion affirming the district court decision.

REASONS FOR GRANTING THE PETITION

There is a conflict between the Eleventh Circuit opinion and decisions of the Supreme Court and the Fourth and Seventh Circuit Courts of Appeal. The Eleventh Circuit upheld a trial court determination that ethnic, national and racial slurs in the workplace were insufficient to constitute direct evidence of discrimination. The Eleventh Circuit disregarded fifty years of federal legislation and jurisprudence as to the harm and detrimental effect caused to an African-American individual subjected to inappropriate and offensive comments directed at the individual due to his race. By refusing to characterize the racial and ethnic slurs used toward Williamson as direct evidence of racial animus and discrimination, the Eleventh Circuit created for a litigant claiming racial discrimination an increased standard of proof to survive summary judgment.

Title VII makes it an "unlawful employment practice" for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1). "A plaintiff must establish a prima facie case using direct evidence of discrimination or by relying on circumstantial evidence

to prove discriminatory intent. *See Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1086 (11th Cir. 2004) and *McDonell v. Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). The evidence before the district court in the instant cause was direct evidence of racial discrimination sufficient to demonstrate racial discrimination in the workplace such that a reasonable jury could find racial discrimination was a motivating factor in Williamson's termination.

Other Circuit Courts of Appeal have considered the effect of the racial slur "nigger" and "boy" in the context of a claim of workplace discrimination. These Circuits determined that the use of the term "nigger" in a workplace environment and held that the racial slur "nigger" is a racial epithet so racially charged that its mere utterance by a supervisor in the presence of, or directed at, an African-American immediately changes the workplace into a hostile work environment. Additionally, the Supreme Court unequivocally established that remarks relating to ethnicity or national origin are a sufficient basis for claims based on allegations of discrimination in the workplace.

At the time of its decision in *Williamson v. Adventist et al*, the Eleventh Circuit had the benefit of the positions of the Supreme Court as well as the Fourth and Seventh Circuit Courts of appeal. The Eleventh Circuit rendered its opinion creating a conflict which requires resolution. If the Eleventh Circuit's decision in the case at bar is allowed to stand, an African-American will not be able to demonstrate direct evidence of racial animus in a workplace environment in an adverse employment decision sufficient to withstand a

motion for summary judgment unless the claimant can demonstrate unequivocally that the employer/ supervisor expressly says "I am firing you because you are black, are a nigger or are from a country whose people are black". African-American's will be subjected to the most offensive of racial remarks directed toward his/her race and will not be entitled to justice for the offense. The treatment of African-American's in the workplace will be set back 50 years.

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT RELATING TO THE LEVEL OF PROOF OF RACIAL ANIMUS REQUIRED TO CREATE A TRIABLE ISSUE OF FACT SUFFICIENT TO PRECLUDE ENTRY OF AN ADVERSE SUMMARY JUDGMENT AS TO A CLAIM OF RACIAL DISCRIMINATION IN THE WORKPLACE.

The Eleventh Circuit's decision upheld the district court's ruling that derogatory racial, ethnic or national origin remarks in the workplace do not constitute direct evidence of racial discrimination or workplace hostility unless the supervisor/employer expressly and directly states that he/she is terminating an employee due to his race, ethnicity or national . The Eleventh Circuit's decision is in conflict with the decision of the Fourth Circuit in *White v. BFI Waste Servs., LLC,* 375 F.3d 288 (4th Cir. 2004) *Spriggs v. Diamond Auto Glass,* 242 F.3d 179, 182 (4th Cir. 2001), the Seventh Circuit in *Rogers v. Western-Southern Life Insurance Co.,* 12 F.3d 668 (7th Cir. 1993) and the Supreme Court in *Saint Francis College v. Al-Khazraji,* 481 U.S. 604, 107 S. Ct. 20100, 95 L. Ed. 582 (1987).

A. REVIEW IS WARRANTED TO RESOLVE A CONFLICT RELATING TO WHETHER THE UTTERANCE OF AN OBVIOUS RACIALLY CHARGED REMARK IN CONJUNCTION WITH AN EMPLOYMENT TERMINATION CONSTITUTES DIRECT EVIDENCE OF RACIAL DISCRIMINATION IN THE WORKPLACE.

The Eleventh Circuit's precedent established that "[I]n order to establish a prima facie case using direct evidence, a plaintiff must present 'evidence, that, if believed, proves [the] existence of [a] fact without inference or presumption; in other words, 'only the most blatant remarks, whose intent could be nothing other than to discriminate . . . constitute direct evidence.'" *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1086 (11th Cir. 2004). Despite this precedent, in the case at bar the Eleventh Circuit determined that the single use of the racial epithet "nigger" at Oceanside was insufficient to constitute direct evidence of racial animus or discrimination in the termination of Williamson. This determination conflicts with decisions of other Circuit Courts of appeal that the use of the term "nigger" in a workplace is sufficiently egregious to present a triable fact in a race discrimination claim. The Fourth and Seventh Circuit Courts of Appeal have acknowledged that the racial epithet "nigger" is so racially charged as to be anthema to an African-American. *See Rogers v. Western-Southern Life Insurance Co.*, 12 F.3d 668 (7th Cir. 1993); *See White v. BFI Waste Servs., LLC*, 375 F.3d 288, 297-98 (4th Cir. 2004) *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 182, 185-86 (4th Cir. 2001). Also, the Supreme Court established that a racial epithet when

used by a supervisor immediately changes the work environment upon its mere utterance. *Meritor*, 477 U.S. at 67, 106 S. Ct. at 2405.

In *Rogers v. Western-Southern Life Insurance Co.*, 12 F.3d 668 (7th Cir. 1993), the Seventh Circuit determined that the district court did not commit clear error in finding that an employer/supervisor's use of the word "nigger" contributed to a hostile work environment. The employer had used the epithet twice in an employees presence. The Seventh Circuit stated that

> "Perhaps no single act can more quickly "alter the conditions of employment and create an abusive working environment', *Meritor*, 477 U.S. at 67, 106 S. Ct. at 2405, than the use of an unambiguously racial epithet such as "nigger" by a supervisor in the presence of his subordinates. See *Bailey v. Binyon*, 583 F.Supp. 923, 927 (N.D.Ill.1984) ("The use of the word 'nigger' automatically separates the person addressed from every non-black person; this is discrimination per se.").

The Fourth Circuit acknowledged that the racial epithets "nigger" and "boy" are racial terms of a discriminatory nature making a workplace environment hostile. *See White v. BFI Waste Servs., LLC*, 375 F.3d 288, 297-98 (4th Cir. 2004) (recognizing pervasive use of terms including "boy," "jigaboo," "nigger," "porch monkey," "Mighty Joe Young," and "Zulu warrior" created triable issue of fact on hostile work environment claim); *Spriggs v. Diamond Auto Glass*, 242 F.3d 179,

182, 185-86 (4th Cir. 2001) (same for repeated use of racial slurs, including "niggers," "monkeys," and "black bitch").

At Oceanside, the supervisor terminated Williamson's employment in connection with a direct racial remark. The white charge nurse stated ". . . Get out of here, I'm not signing nothing, you stupid nigger. . . ." The district court failed to address whether this constituted direct evidence of discrimination. Additionally, at Fish Memorial, the supervising nurse called Williamson a "Jamaican boy" at the time of termination of Williamson's employment. The district court deemed references to Jamaica and banana boats to by national origin jokes and did not specifically address the "Jamaican boy" comment. The Eleventh Circuit in its opinion determined that the "nigger" comment was separate from the termination decision and, therefore, did not constitute direct evidence of racial discrimination. The Eleventh Circuit affirmed the district court's determination that the national origin comments were jokes, and if they were not, they only constituted circumstantial evidence of discrimination. However, a reasonable jury could determine this statement to be direct evidence of racial discrimination or a racial motive for termination. Apparently, the Eleventh Circuit requires that in order to classify this act as direct evidence of discrimination, Williamson should be required to show that the charge nurse said something like "Get out of here, I'm not signing nothing, [because you are a] stupid nigger."; or "You are fired because you are a Jamaican boy."

Additionally, the Eleventh Circuit and Seventh Circuit conflict in their requirements for temporal proximity of a racial remark in relation to an adverse employment decision or situation in order of the racial remark to constitute evidence of discrimination. In *Williamson*, the racial remarks were made at the time of the termination of Williamson. The Eleventh Circuit held these remarks to were separate in time from the challenged employment decision. In *Rogers*, the racial statements were months before the adverse employment action, yet were held to be evidence of racial discrimination or hostility.

This Court should review the conflict created by the Eleventh Circuit Decision in *Williamson* and the decisions of the Fourth and Seventh Circuits. If the *Williamson* decision is allowed to remain, employers in the Eleventh Circuit will have one free racial epithet per employee with impunity. Employers will be allowed to harbor racial animus and make decisions while subject to the animus without fear of reprisal as long as the employer limits acknowledgment of the prejudice or discrimination to a single outburst at the time of the termination.

B. REVIEW IS WARRANTED TO RESOLVE A CONFLICT RELATING TO WHETHER ETHNIC OR NATIONAL ORIGIN-BASED REMARKS ARE DIRECT EVIDENCE OF DISCRIMINATION TO PRECLUDE ENTRY OF AN ADVERSE SUMMARY JUDGMENT AS TO A CLAIM OF RACIAL DISCRIMINATION.

In its decision, the Eleventh Circuit determined that the ethnic remarks were not direct evidence of racial discrimination or racial animus. However, the express language of 42 U.S.C. § 2000(e)(2)(a) establish national origin as an actionable discrimination factor. Also, the Supreme Court clearly has established that workplace remarks relating to ethnicity or national origin are actionable and constitute evidence of, and a basis for, discrimination claims. *See Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 107 S. Ct. 20100, 95 L. Ed. 582 (1987). An individual may be discriminated against as a result of ethnicity or national origin; the discrimination need not be racial.

In *Saint Francis College*, the Supreme Court considered whether an Arab man could allege discrimination based on his nationality when the nationality was considered Caucasian. The issue was whether the respondent/Arab had alleged *racial* discrimination within the meaning of § 1981 as an Arab man asserting racial discrimination by Caucasians against him. The petitioners contended that the respondent was a Caucasian and, therefore, could not allege against another Caucasian the kind of discrimination § 1981 forbade. The petitioner's

argument was based on the assumption that all persons regardless, of ethnicity or nationality, who were considered Caucasian when § 1981 became law were precluded from asserting a discrimination against other Caucasians. *Id.*

The *Saint Francis College* Court fully considered the legislative history of enactment of § 1981 and stated,

> Based on the history of § 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory. The Court of Appeals was thus quite right in holding that § 1981, "at a minimum," reaches discrimination against an individual "because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of *homo sapiens.*" It is clear from our holding, however, that a distinctive physiognomy is not essential to qualify for § 1981 protection. If respondent on remand can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin, or his religion, he will have made out a case under § 1981.

Justice BRENNAN in a concurring opinion stated,

> Pernicious distinctions among individuals based solely on their ancestry are antithetical to the doctrine of equality upon which this Nation is founded. Today the Court upholds Congress' desire to rid the Nation of such arbitrary and invidious discrimination, and I concur in its opinion and judgment. I write separately only to point out that the line between discrimination based on "ancestry or ethnic characteristics," *ante*, at 613, and discrimination based on "place or nation of . . . origin," *ibid.*, is not a bright one. It is true that one's ancestry—the ethnic group from which an individual and his or her ancestors are descended—is not necessarily the same as one's national origin—the country "where a person was *born*, or, more broadly, the country from which his or her ancestors *came*." *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 88, 94 S.Ct. 334, 336, 38 L.Ed.2d 287 (1973) (emphasis added). Often, however, the two are identical as a factual matter: one was born in the nation whose primary stock is one's own ethnic group. Moreover, national origin claims have been treated as ancestry or ethnicity claims in some circumstances. For example, in the Title VII context, the terms overlap as a legal matter. See 29 CFR § 1606.1 (1986) (emphasis added) (national origin discrimination "includ[es], but [is] not limited to, the denial of equal employment opportunity because of

> an individual's, or his or her ancestor's, place of origin; *or* because an individual has the physical, cultural, or linguistic characteristics of a national origin group"); *Espinoza*, *supra*, at 89, 94 S.Ct., at 337 (the deletion of the word ancestry from the final version of § 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(e), "was not intended as a material change, . . . suggesting that the terms 'national origin' and 'ancestry' were considered synonymous"). I therefore read the Court's opinion to state only that discrimination based on *birthplace alone* is insufficient to state a claim under § 1981.

Consequently, contrary to the Eleventh Circuit's contention, national origin discrimination was actionable under Williamson's causes of action regardless of whether the subject comments were deemed racial.

The white supervising nurse at Fish Memorial repeatedly referred to Williamson as "Mon" and made comments about a "banana boat". When Williamson attempted to address the false allegations that he was the reason medication was not given to a patient, the nurse supervisor said "That Jamaican boy, who [does] he think he is better than the nurses." The Jamaican population is overwhelmingly black. Any comments relating to Jamaican heritage necessary comment upon the black race, whether positively or negatively. Additionally, references to "banana boats" are derogatory in that they conjure images of refugees or the poor. In making these statements, the supervisor suggested that *Williamson*, a licensed practicing nurse, was a poor black refugee.

The district court disregarded this conduct as direct evidence of racial animus by concluding that the remarks were made jokingly and that the remarks were not racially-related but rather were directed at "national origin." The Eleventh Circuit accepted the district court's determination that the statements were "jokes" and further questioned whether the statements were racially discriminatory. This Court should accept review to resolve the conflict of when an obvious racial or national origin comment rises to the level of direct evidence in a racial discrimination case.

C. CONCLUSION

In *Williamson*, the racially charged remarks were made by the decision makers in the context of the decision and temporally proximate to the employment decision. First, both at Oceanside and Fish Memorial, the racially derogatory statements were made by supervising charge nurses. Second, both statements were directly part of the circumstances and discussions leading to the decision to fire Williamson. Third, the statements were made immediately or virtually immediately at the time of termination of Williamson's employment. Finally, discriminatory remarks had a profound psychological effect upon Williamson and made Williamson feel as though his supervisors questioned his professional competence because of his race and national origin.

This Court should resolve the conflict between the Eleventh Circuit and the other Circuit Courts of Appeal when obvious and blatant derogatory racial remarks are used in the context of a employee termination of an

employee in a protected class. The law needs consistency in the treatment of racially protected employees in order to prevent mistreatment of the protected class in the workplace. In the Eleventh Circuit employers to refrain from blatant and obvious racial and /or ethnic remarks to employees. There simply is no place for such conduct in the workplace without reprisal to the employer. Other Circuit Courts of Appeal have acknowledge this standard; this Court should resolve the conflict and bring the Eleventh Circuit in line with the decisions of this Court and the other Circuit Courts or Appeal.

CONCLUSION

Based on the foregoing argument, Petitioner request that the United States Supreme Court grant certiorari review of this instant cause.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED APRIL 13, 2010

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 09-12936
Non-Argument Calendar

D.C. Docket No. 08-00032-CV-ORL-31-GJK

MICHAEL WILLIAMSON,

Plaintiff-Appellant,

versus

ADVENTIST HEALTH SYSTEM/SUNBELT, INC., A Florida Non Profit Corporation, SOUTHWEST VOLUSIA HEALTHCARE CORPORATION, A Florida Non Profit Corporation, d.b.a. Florida Hospital Fish Memorial, MEMORIAL HEALTH SYSTEMS, INC., A Florida Non Profit Corporation, d.b.a. Florida, Hospital - Oceanside, MEDICAL STAFFING NETWORK, INC., a Foreign for Profit Corporation,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(April 13, 2010)

Appendix A

Before DUBINA, Chief Judge, BLACK and PRYOR, Circuit Judges.

PER CURIAM:

Appellant Michael Williamson appeals from the district court order granting summary judgment in favor of all defendants on his race discrimination in employment claims, brought under 42 U.S.C. § 2000e-2 and 42 U.S.C. § 1981. In a two-count complaint, Williamson, a Jamaican-born black male, charged that he suffered race-based discrimination in employment at two separate hospitals where he worked as a temporary licensed practical nurse. After reviewing the briefs and the record, we affirm the district court order granting summary judgment in favor of the defendants.

I.

Pursuant to his contract with defendant Medical Staffing Network, Inc. ("MSN"), Williamson received temporary nursing assignments with defendants Florida Hospital-Oceanside ("Oceanside") and Florida Hospital Fish Memorial ("Fish"), in June and July 2006. Oceanside and Fish are subsidiaries of Advent Health System/Sunbelt, Inc. ("AHS"). Williamson charged in his complaint that Oceanside and Fish discriminated against him because of his race, and sued each of the defendants for the alleged violations of federal law.

Williamson contends that Oceanside effectively terminated his employment after he refused to perform janitorial duties. He contends he was the subject of a racial epithet before Oceanside refused his future assignments to the hospital. Williamson contends that supervisors at Fish commented on his race and national origin more than once, and ultimately declined further assignments for him at the hospital because of his admitted failure to procure prescribed medicine for a patient during his shift. Williamson asserts that other permanent, non-minority nurses were not terminated when their performance was deficient.

Williamson alleges that AHS, as the controlling shareholder of subsidiaries Oceanside and Fish, exercised control over these entities and should be liable for their discriminatory conduct. The record evidence, however, consists only of sworn statements by AHS's in-house counsel and vice president of human resources, stating that even though AHS is the corporate parent of both Oceanside and Fish, the hospitals operate independently. They have their own corporate officers, board of directors, and human resources departments. Williamson also argues that MSN is liable for the racial discrimination in its role as a temporary staffing agency.

II.

We review a district court order granting summary judgment *de novo*, viewing all of the facts in the record in the light most favorable to the non-moving party. *Brooks v. County Comm'n of Jefferson County, Ala.*, 446

F.3d 1160, 1161-62 (11th Cir. 2006). Summary judgment is appropriate where the moving party demonstrates, through "pleadings, the discovery and disclosure materials on file, and any affidavits," that no issue of material fact exists, and it is "entitled to judgment as a matter of law." Fed. R. Civ. P 56(c).

III.

Williamson first argues that MSN is liable for its role in the discrimination inflicted by Fish and Oceanside under a "cat's paw" theory. We have held that a "cat's paw" theory of recovery may apply when a biased actor recommends that an adverse employment action be taken against an employee, but the biased actor is not the ultimate decision-maker. *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999). In such a situation, the employee must provide evidence that the recommender's alleged discriminatory animus directly caused the decision-maker to take adverse employment action against its employee. *Id.* at 1331.

We conclude from the record that the district court did not err in granting summary judgment in MSN's favor. Williamson testified that MSN did not give him any more assignments after Oceanside and Fish requested that he not be assigned to their respective hospitals again, showing that MSN passively acceded to the decisions of Oceanside and Fish in making its own adverse employment decision regarding Williamson. An application of the theory could only be made, however, after it has been established that either Oceanside or

Fish (or both) discriminated against Williamson. That is the essence of a "cat's paw" theory. Because Williamson failed to establish a *prima facie* case of racial discrimination against either Oceanside or Fish, as we conclude below, MSN was entitled to summary judgment on Williamson's "cat's paw" theory. As for direct liability, the district court properly determined that Williamson failed to provide any evidence that MSN itself discriminated against him, and we therefore affirm that ruling.

Williamson next argues that the district court erred in ruling as a matter of law that AHS could not be held liable for the alleged racial discrimination he suffered at Oceanside and Fish. He argues that AHS was his employer under the "economic realities" test, and that it could be held liable for interfering with his contract with MSN because AHS controlled Oceanside and Fish.

In determining whether two businesses should be treated as a joint employer for Title VII purposes, we apply the standards promulgated by the National Labor Relations Board ("NLRB"), which include: "(1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control." *McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 933 (11th Cir. 1987). We have separately adopted the "economic realties" test to determine whether a Title VII plaintiff is an employee of an defendant business entity. *Cuddeback v. Fla. Dep't of Educ.*, 381 F.3d 1230, 1234 (11th Cir. 2004).

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The district court's determination that AHS did not exercise control over Oceanside or Fish sufficient to impute liability for their alleged discriminatory actions is fully supported by the undisputed factual record. Williamson's bare assertions of corporate control do not negate the actual record evidence to the contrary. The undisputed facts preclude a finding that AHS was Williamson's employer under the NLRB standard or the "economic realities" test. They also establish Oceanside and Fish were operating as independent decision-makers in personnel matters, precluding any argument for liability against AHS under a "cat's paw" theory. Summary judgment in AHS's favor was therefore proper.

Williamson lastly argues that he provided direct and circumstantial proof of racial discrimination by Oceanside and Fish, and that the district court therefore erred in granting summary judgment in their favor. As direct evidence, Williamson cites an Oceanside supervisor calling him a "nigger" after he refused to perform certain assigned duties, and a Fish supervisor's references to his Jamaican heritage. Williamson relies on this same evidence as proof, under a circumstantial case analysis, that the hospitals' proffered non-discriminatory reasons were pretextual.

Title VII makes it unlawful for an employer "to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national

origin." 42 U.S.C. § 2000e-2(a)(1). When a plaintiff uses circumstantial evidence in an attempt to prove discrimination or retaliation under Title VII, we may apply the burden shifting approach articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *Crawford v. Carroll*, 529 F.3d 961, 975-76 (11th Cir. 2008). Under the *McDonnell Douglas* framework, a plaintiff has the initial burden to establish a *prima facie* case of discrimination. *Crawford*, 529 F.3d at 976. To establish a *prima facie* case of discrimination under Title VII, a plaintiff must show that "(1) he is a member of a protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) he was . . . treated less favorably than a similarly-situated individual outside his protected class." *Maynard v. Bd. of Regents of Div. of Univs. of Fla. Dep't of Educ.*, 342 F.3d 1281, 1289 (11th Cir. 2003). "To show that employees are similarly situated, the plaintiff must show that the employees are similarly situated in all relevant respects . . . ." *Knight v. Baptist Hosp. of Miami, Inc.*, 330 F.3d 1313, 1316 (11th Cir. 2003) (internal quotation marks omitted).

Once the plaintiff has made out the elements of the *prima facie* case, the employer must articulate a non-discriminatory basis for its employment action. *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1361 (11th Cir. 1999). If non-discriminatory reasons are identified, the plaintiff must then show that the proffered reasons were pretextual. *Id.*; *Crawford*, 529 F.3d at 976. Specifically, to survive summary judgment, the employee must come forward with evidence

sufficient to permit a reasonable fact finder to conclude that the legitimate reasons given by the employer were not its true reasons, but were a pretext for discrimination. *Chapman v. AI Transp.*, 229 F.3d 1012, 1024 (11th Cir. 2000) (*en banc*).

A plaintiff may, however, establish a *prima facie* case of discrimination through direct evidence. *Damon*, 196 F.3d at 1358. We have defined direct evidence "as evidence which reflects a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee." *Id.* (internal quotation marks omitted). "[T]he evidence must indicate that the complained-of employment decision was *motivated* by the decision-maker's [racial animus]." *Id.* at 1358-59 (emphasis in original). To qualify as direct evidence of discrimination, we require that a biased statement by a decision-maker be made concurrently with the adverse employment event, such that no inference is necessary to conclude that the bias necessarily motivated the decision. *See id.* at 1359.

The district court properly granted summary judgment in Oceanside's favor. Under our precedent, the Oceanside supervisor's alleged racial epithet does not constitute direct evidence of discrimination. A biased statement, separate in time from the employment decision under challenge, is not direct evidence of discrimination. *See id.* Absent this level of proof, the fact-finder is asked to infer that the racially-biased attitude revealed by the statement was what motivated the prior (or subsequent) employment decision, and the evidence is not direct evidence.

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The district court's summary judgment ruling as to Oceanside was likewise correct under a circumstantial case analysis. Williamson's refusal to perform the duties to which he was assigned provided a legitimate, non-discriminatory reason for Oceanside to not request him again, and Williamson provided nothing to show that this proffered reason was unworthy of credence, or otherwise pretextual. Moreover, Williamson did not offer any evidence that a non-black temporary licensed practical nurse or registered nurse was retained after refusing a staffing assignment.

The district court's summary judgment ruling as to Fish also was correct. The evidence primarily relied upon by Williamson regarding Fish consisted of references or jokes by a supervisor about his Jamaican heritage, occurring both before and after his final shift there. Even if considered race-based, however, these alleged comments do not rise to the level of direct evidence under our precedent, as the fact-finder would have to infer from these comments that the supervisor's inappropriate racial attitudes motivated her decision to request that Williamson no longer be assigned to Fish.

For purposes of a circumstantial analysis, the critical medication error, which Williamson admitted to during his final shift at Fish, provided a legitimate, non-discriminatory reason for Fish to ask that he not be assigned there again. Williamson provided nothing to show that this proffered reason was unworthy of credence or was pretextual. Williamson also failed to show that any similarly-situated employee outside of his

protected class was treated differently under similar circumstances. We conclude that summary judgment in Fish's favor was therefore appropriate.

IV.

For the aforementioned reasons, we affirm the district court order granting summary judgment in favor of the defendants on all of Williamson's claims.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION DATED AND FILED MAY 18, 2009

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 6:08-cv-32-Orl-31GKJ

MICHAEL WILLIAMSON,

Plaintiff,

-vs-

ADVENTIST HEALTH SYSTEM/SUNBELT, INC., SOUTHWEST VOLUSIA HEALTHCARE CORPORATION, MEMORIAL HEALTH SYSTEMS, INC., and MEDICAL STAFFING NETWORK, INC.,

Defendants.

ORDER

This matter comes before the Court on the Motions for Summary Judgment filed by Defendant Adventist Health System/Sunbelt, Inc. ("Adventist Health ") (Doc. 32), Defendant Memorial Health Systems, Inc. d/b/a Florida Hospital Oceanside ("Oceanside") (Doc. 34), Defendant Southwest Volusia Healthcare Corporation d/b/a Florida Hospital Fish Memorial ("Fish Memorial") (Doc. 35), and Defendant Medical Staffing Network, Inc.

("Medical Staffing") (Doc. 36), as well as the responses (Doc. 39, 41) filed by the Plaintiff, Michael Williamson ("Williamson"), and the reply to that response (Doc. 44) filed by Oceanside and Fish Memorial.

I. Background

Williamson, a Jamaican-born black male (Doc. 1 at 4), is a Licensed Practical Nurse, or LPN. During the times at issue in this case, he was employed by Medical Staffing, a service that places nurses in temporary positions in hospitals and similar facilities. In June and July 2006, Williamson was assigned by Medical Staffing to work at Oceanside, where he worked approximately five shifts, and then at Fish Memorial, where he worked seventeen shifts. Adventist Health owns both Oceanside and Fish Memorial.

Williamson contends that he was subjected to racial discrimination while working at both facilities, both of which allegedly culminated in his termination. At Oceanside, he contends, he was asked to perform janitorial duties and when he refused, he was called a "stupid nigger" and terminated. At Fish Memorial, he was held responsible for an incident in which a patient did not receive his medication, and terminated. He contends that he was not at fault, and that this was one of several occasions where he was treated differently at Fish Memorial due to his race.

On January 7, 2008, Williamson filed the instant suit, contending that the Defendants discriminated against

him on the basis of his race in violation of Title VII and interfered with his right to make and enforce contracts in violation of 42 U.S.C. §1981. All four of the Defendants now seek summary judgment as to both claims asserted against them.

II. Standards

A. Summary Judgment

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). Whether a fact is material depends on the substantive law of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). If there is an absence of evidence on a dispositive issue for which the non-moving party bears the burden of proof, that party must "go beyond the pleadings and by . . . affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (internal quotations and citation omitted). Summary judgment is mandated against the non-moving party who thereafter fails to present sufficient evidence to establish a genuine issue of fact for trial. *Id.* at 322, 324-25.

In this review, the Court must consider all inferences drawn from the underlying facts in a light most favorable to the non-moving party, and resolve all reasonable doubts against the moving party. *Anderson*, 477 U.S. at 255. If an issue of material fact exists, the court must not decide it, but rather, must deny summary judgment and proceed to trial. *Environmental Def. Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. 1981).

B. Title VII

To establish a Title VII discrimination claim, a plaintiff must present proof of discriminatory intent through either direct or circumstantial evidence. *E.E.O.C. v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1286 (11th Cir. 2000). "Direct evidence is evidence that establishes the existence of discriminatory intent behind the employment decision without any inference or presumption." *Id.* (quoting *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998)). Only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of some impermissible factor constitute direct evidence of discrimination. *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1086 (11th Cir. 2004). If the alleged statement suggests, but does not prove, a discriminatory motive, then it is circumstantial evidence. *See Burrell v. Bd. of Trustees of Ga. Military Coll.*, 125 F.3d 1390, 1393 (11th Cir. 1997). Where the plaintiff is able to prove by direct evidence that the employer acted with a discriminatory motive, the employer to prevail must prove, by a preponderance of the evidence, that the same decision would have been

reached even absent that motive. *Miles v. M.N.C. Corp.*, 750 F.2d 867, 875-76 (11th Cir. 1985).

In a case where there is no direct evidence of discrimination, a court is to analyze whether summary judgment is appropriate under the familiar framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) and *Texas Department of Community Affairs v. Barton*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). *See Wilson*, 376 F.3d at 1087. Under that framework, the plaintiff first bears the threshold burden of establishing a prima facie case of discrimination. *Id.* The manner of doing so is not fixed; rather, it depends to a large degree on the situation. *Id.*; *Jones v. Gerwens*, 874 F.2d 1534, 1539 (11th Cir. 1989). A prima facie case is established, in a given situation, by evidence that tends to eliminate the most common nondiscriminatory reasons for an employer's action. *See Gerwens*, 874 F.2d at 1539. Generally speaking, a plaintiff may establish a prima facie case of race discrimination by showing that: (1) he belongs to a racial minority; (2) he was subjected to adverse employment actions; (3) his employer treated similarly-situated employees outside his racial minority more favorably; and (4) he was qualified to do the job. *Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997). Failing that, the plaintiff must, at least, meet the threshold of establishing facts to support a reasonable inference of discriminatory intent. *Id.* at 1562, 1564; *Wilson*, 376 F.3d at 1087, 1092.

If the plaintiff establishes a prima facie case, a rebuttable presumption of discrimination arises, and the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for its actions. *Wilson*, 376 F.3d at 1087. The employer "need not persuade the court that it was actually motivated by the proffered reasons." *Id.* (citation omitted). If the proffered reason might motivate a reasonable employer, the presumption of discrimination is rebutted. *Id.* The plaintiff must meet any such proffered reason head on, rather than quarrel with its reasonableness, and prove that it is a pretext — *i.e.*, the proffered reason did not honestly motivate the employer. *Id*; *Chapman v. AI Transport*, 229 F.3d 1012, 1030 (11th Cir. 2000) (holding that, regardless of whether the proffered reason is unfair, heavy handed, or based on erroneous facts, the "inquiry is limited to whether the employer gave an honest explanation of its behavior.") (citations omitted).

C. Section 1981

Section 1981 provides, in pertinent part, that all persons within the jurisdiction of the United States "shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." 42 U.S.C. § 1981 (a). The standards for proving racially discriminatory treatment in violation of Section 1981 are the same as the standards for proving racially discriminatory treatment in violation of Title VII. *Crawford v. Western Elec. Co., Inc.*, 745 F. 2d 1373, 1376-77 (11th Cir. 1984).

III. Analysis

Adventist Health

Williamson was not employed by Adventist Health, and he does not allege that Adventist Health or its employees ever took any actions against him directly, such as firing him or subjecting him to racial epithets. He seeks to hold Adventist Health liable in this case solely in its capacity as owner of Defendants Oceanside and Fish Memorial, which operated the two hospitals where he worked.

It is well settled that parent companies are not liable for acts of their wholly owned subsidiaries merely because they own their stock. *See, e.g., U.S. v. Bestfoods*, 524 U.S. 51, 61, 118 S.Ct. 1876, 141 L.Ed. 2d 43 (1998). Adventist Health argues that Williamson has not produced any evidence that would justify holding it liable for discrimination inflicted by any of the other defendants.[1] In response, Williamson is unable to point to any such evidence, such as anything to show that Adventist Health exerted control over the employees of Oceanside or Fish Memorial. (Doc. 39 at 4). Williamson instead points to the fact that he has not been assigned to work for any Adventist Health -owned hospitals since the events at issue in his complaint, and suggests that a reasonable jury could conclude that

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1. Such as, for example, if Adventist Health was actually a joint employer with Oceanside or Fish Memorial. *See, e.g., Smith v. Auto Nation, Inc.*, 2000 U.S. Dist. LEXIS 22985, 2008 WL 3155055 (S.D.Fla. 2000).

Adventist Health was in a position to interfere with his employment relationship with Medical Staffing, and did so. (Doc. 39 at 5-6). But the former is not evidence of discrimination or grounds for holding Adventist Health liable for discrimination committed by others, and the latter is entirely speculative. Williamson has failed to demonstrate the existence of a genuine issue of material fact with regard to his claims against Adventist Health, which is therefore entitled to summary judgment.

EEOC Charge

By statute, a Title VII plaintiff must file his claim within 90 days of receiving his right-to-sue letter from the Equal Employment Opportunity Commission. 42 U.S.C. § 2000e-5(f)(1). Williamson filed this suit on January 7, 2008, more than six months after the EEOC issued his right-to-sue letter. The three remaining defendants all contend that the Title VII claims against them are therefore barred as untimely. However, Williamson testified that his right-to-sue letter was initially mailed to his previous address, and he did not receive it until October 2007 — less than 90 days before he brought suit. There is also record evidence that Williamson notified the EEOC of his new address prior to its issuance of the right-to-sue letter, including a letter received by the EEOC in November 2006 in which Williamson wrote that "my address and telephone number has[sic] been changed". (Doc. 35-5 at 3). Williamson included the proper address (and did not list the old address) in the letter. (Doc. 35-5 at 3). As such, a reasonable jury could conclude that Williams was not at fault for the untimely filing of this suit.

Appendix B

Medical Staffing

Williamson contends that Medical Staffing discriminated against him by complying with requests from Oceanside and Fish Memorial that he not be assigned to work at their facilities anymore. There is a dispute as to whether Oceanside made such a request; however, assuming that such a request occurred, the Court concludes that Williamson has not provided sufficient evidence of discrimination on the part of Medical Staffing to survive a motion for summary judgment.

As Medical Staffing notes, it is not clear from Williamson's complaint or his papers whether he is contending that he was subjected to hostile environment discrimination, disparate treatment discrimination, or both. Regardless, Williamson has not shown any basis for holding Medical Staffing liable. He has not even argued that Medical Staffing intended to discriminate against him when it complied with the request to stop assigning him to Oceanside or Fish Memorial. He has not produced any evidence that Medical Staffing could control the allegedly discriminatory employees at Oceanside or Fish Memorial or even that Medical Staffing knew about most of the events at issue in this suit until after it had ended his assignment to those facilities. Moreover, he has not produced any evidence that Medical Staffing had a choice about whether to keep assigning him to work at Oceanside and Fish Memorial after those entities requested that he be

reassigned.[2] And Williamson has not even attempted to show that Medical Staffing treated anyone outside of his protected class more favorably than it treated him, such as by continuing to reassign them to a particular facility against the wishes of its owner. Williamson has failed to establish a *prima facie* case as to Medical Staffing.

The Hospital Defendants

The temporary staffing relationship between Medical Staffing on the one hand and Oceanside and Fish Memorial on the other raises a question as to which entity or entities should properly be considered Williamson's "employer" under Title VII and Section 1981. Rather than attempting to resolve that issue on summary judgment, for the purpose of resolving the instant motions the Court assumes that Oceanside and Fish Memorial were Williamson's "employer" when he was working at their facilities, just as Medical Staffing was.

In his response to the motions for summary judgment from Oceanside and Fish Memorial, Williamson has tried to lump together all of the allegedly

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2. The Court also notes that Williamson's legal theory makes little sense in regard to Medical Staffing. In essence, Williamson is complaining that Medical Staffing discriminated against him by refusing to return him to workplaces where he was being discriminated against If anything, requiring an employee to return to such a situation would appear to be the wrong choice for an employer in Medical Staffing's position.

discriminatory conduct he experienced while working at those facilities. However, he has not shown any basis for holding Oceanside responsible for the actions of Fish Memorial's employees, or vice versa. The Court will therefore consider the conduct that allegedly occurred at each facility separately.

Oceanside

Williamson relies on two incidents to establish that he was subjected to discrimination while working at Oceanside. In the first, another nurse requested that Williamson be assigned the duties of a Patient Care Technician. The duties of a PCT overlap somewhat with those of an LPN, but the duties of a PCT are somewhat more janitorial in nature. However, Williamson was not asked to perform the PCT duties at that time.

On July 3, 2006, Williamson was asked by the charge nurse, Helen Turk ("Turk"), to perform the duties of a PCT. Williamson refused. According to Williamson, this greatly angered Turk, leading her to ask him, "Who do you think you are?" He contends that subsequently, when she saw him approaching with what appeared to be a time sheet requiring her signature, she told him, "Get out of here, I'm not signing anything, you stupid nigger."[3] He contends that both Turk's request that he work as a PCT and her subsequent refusal to sign

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3. Although Turk denies making these statements, the Court will treat Williamson's allegations that she did so as true for purposes of resolving the motion.

anything for him — which Williamson interprets as a termination — were motivated by racial animus. After the July 3 incident, Williamson was not assigned to work at Oceanside again.

The first incident obviously cannot support a claim of discrimination, as the suggestion to reassign Williamson's duties was not implemented, and therefore his employment was not affected. As for the second incident, there is no evidence that Williamson was singled out for reassignment to PCT duties due to his race. Turk testified that white LPNs were assigned to work as PCTs when the need arose, and that a white LPN had been doing so the night Turk was asked to do so. A Medical Staffing representative testified that it was not uncommon for LPNs to be asked to perform PCT duties. Williamson did not produce any evidence to the contrary. Moreover, Williamson's refusal to perform his assigned duties is enough to establish that Oceanside would have requested his reassignment even in the absence of Turk's allegedly discriminatory animus.

In addition, Williamson failed to exhaust his administrative remedies as to Oceanside, as he failed to file a charge of discrimination against that entity with the EEOC. Williamson did file a charge against "Florida Hospital" that included, among other things, a claim that he was discriminated against on July 3, 2006 — the date of the incident involving Turk. However, Williamson listed Fish Memorial's address on the form, not that of Oceanside, and the remainder of the information

included (such as other harassment and a termination on July 26, 2006) pertains to Fish Memorial, not Oceanside. Williamson contends that the EEOC investigator told him that Oceanside and Fish Memorial were "the same". However, when Williamson requested his right to sue letter, he did so as to "Florida Hospital (Fish Memorial)". (Doc. 34-5 at 3). And it is undisputed that Oceanside was not notified of Williamson's claim by the EEOC.

Fish Memorial

According to Williamson, he was forced to endure a number of different incidents of mistreatment while working at Fish Memorial. He contends that he was refused a computer password, and that one of the nurses refused to talk to him. He also complains that he was repeatedly criticized for being too diligent. For example, he says that he was criticized for including information in patients' charts about mistakes made by other hospital employees, thereby exposing the hospital to the threat of a malpractice suit. However, as to these alleged incidents, there is no evidence that this treatment was based on Williamson's race. Williamson has made no showing that white LPNs in his position were issued passwords, or that the anonymous nurse who would not talk to him treated white co-workers differently. Indeed, as to the complaints regarding his allegedly excessive diligence, the complaints were admittedly based on a fear of liability, not racial animus. Thus, these incidents cannot constitute evidence of discrimination.

Williamson does assert that Jean Kaster — the Director of the Medical Surgical Department at Fish Memorial — addressed him on approximately three occasions by saying "Hey, mon" and joking about him coming from a "banana boat". Williamson also asserts that when he returned to Fish Memorial to discuss the Lovenox incident (discussed below) with Kaster, he overheard her on the phone saying "That Jamaican boy, who does he think he is?"[4]

Williamson worked his last shift at Fish Memorial on July 26, 2006. Near the beginning of his shift, Williamson testified, he learned that one of Fish Memorial's physicians, Dr. Hood, had changed a patient's medication to Lovenox, and that Williamson needed to obtain the new medication from the hospital pharmacy and administer it as soon as possible. Williamson testified that he repeatedly contacted the pharmacy but the drug was not dispensed before his shift ended. On July 28, Williamson was contacted by someone from Medical Staffing and told that the doctor was very upset about the failure to obtain the medication and that he — Williamson — was being blamed. (Williamson contends that the failure to dispense the

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4. As noted above, it is not clear whether Williamson intends to assert a hostile environment claim in this suit. If he does, these remarks by Kaster are not enough to support such a finding. A plaintiff must establish not only that he perceived the environment was hostile, but that a reasonable person would perceive the environment as hostile and abusive, considering the totality of the circumstances. *See, e.g., Gupta v. Florida Board of Regents*, 212 F.3d 571, 590 (11th Cir. 2000).

Appendix B

Lovenox lies with the pharmacy and with Christine Tarkowski, the "Resource" nurse on duty during his shift, for failing to insist that the pharmacists fill the prescription.) According to Williamson, the Medical Staffing representative told him that Kaster had asked that he not be assigned to any Florida Hospital entity, although Kaster testified she only asked that he not be assigned to Fish Memorial. Williamson testified that after the Lovenox incident, he was never offered assignments by Medical Staffing.

Williams appears to argue that Kaster's remarks — saying "Hey, mon," asking if he had traveled by banana boat, and calling him a "Jamaican boy" — constitute direct evidence of racial discrimination. They do not. For one thing, they appear to refer to his national origin, rather than his race. But even assuming that a reference to his race is implicit in those remarks, they do not constitute direct evidence of discrimination, because they do not explicitly demonstrate an intent to discriminate against Williamson. Moreover, they were not made in relation to any employment decision regarding him.

Similarly, Williamson cannot establish a *prima facie* case by way of circumstantial evidence. Among other problems, Williamson has failed to make a showing that any employees from outside of his protected class were treated more favorably than he was under similar circumstances. He complains that Tarkowski, who is white, was not punished for the failure to administer the Lovenox. But he has not produced any evidence that

Tarkowski bore any responsibility for seeing that this drug was administered, or that the prescribing doctor blamed Tarkowski for the failure. Williamson has also produced no evidence from which a reasonable jury could conclude that Tarkowski, a permanent employee with apparently different job responsibilities, was "similarly situated" to Williamson, a temporary employee.[5] Thus Williamson has failed to establish a *prima facie* case of discrimination under with either direct or circumstantial evidence.

IV. Conclusion

In consideration of the foregoing, it is hereby

ORDERED that the Motion for Summary Judgment filed by Defendant Adventist Health System/ Sunbelt, Inc. (Doc. 32) is **GRANTED**; and it is further

ORDERED that the Motion for Summary Judgment filed by Defendant Memorial Health Systems, Inc. d/b/a Florida Hospital Oceanside (Doc. 34) is **GRANTED**; and it is further

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5. As evidence of disparate treatment, Williamson also cites one white nurse who improperly recorded information on patients' charts and another who left a tourniquet on a patient's arm for too long, complaining that they were not punished for their errors. But Williamson makes no more effort to establish that these anonymous nurses were similarly situated to him than he did with Tarkowski.

ORDERED that the Motion for Summary Judgment filed by Defendant Southwest Volusia Healthcare Corporation d/b/a Florida Hospital Fish Memorial (Doc. 35) is **GRANTED**; and it is further

ORDERED that the Motion for Summary Judgment filed by Defendant Medical Staffing Network, Inc. (Doc. 36) is **GRANTED**. The Clerk is directed to enter judgment for the Defendants and close the case.

DONE and ORDERED in Chambers, Orlando, Florida on May 18, 2009.

/s/ Gregory A. Presnell
GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

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(2)

No. 10-77

U.S.
AUG 12 2010
CLERK

In The
Supreme Court of the United States

MICHAEL WILLIAMSON,

Petitioner,

v.

ADVENTIST HEALTH SYSTEM/SUNBELT, INC., SOUTHWEST VOLUSIA HEALTHCARE CORPORATION d/b/a FLORIDA HOSPITAL FISH MEMORIAL, MEMORIAL HEALTH SYSTEMS, INC. d/b/a FLORIDA HOSPITAL – OCEANSIDE, and MEDICAL STAFFING NETWORK, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT MEDICAL STAFFING NETWORK, INC.'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6, Respondent Medical Staffing Network, Inc. states that it is a publicly traded company (stock "ticker" symbol MSNW). Respondent further states that Medical Staffing Holdings, LLC and Medical Staffing Network Holdings, Inc. are parent companies of Respondent.

STATUTORY PROVISIONS INVOLVED

Title 11 United States Code, Section 382. Automatic Stay.

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of –

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a corporate debtor's tax liability for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

ARGUMENT

I. This Matter Must be Stayed as to Respondent Medical Staffing Network, Inc. Pursuant to the Bankruptcy Code's Automatic Stay Provision.

On July 2, 2010 (the "Petition Date"), Medical Staffing Network, Inc. (the "Debtor") filed a Voluntary Chapter 11 Petition in the United States Bankruptcy Court for the Southern District of Florida, under Case No. 10-29101-BKC-EPK. By virtue of the bankruptcy filing, the Debtor's property is subject to the jurisdiction of the United States Bankruptcy Court for the Southern District of Florida.

Pursuant to § 362 of Title 11 of the United States Code (the "Bankruptcy Code"), an automatic stay is in effect which enjoins, *inter alia*, the prosecution of the above captioned case against the Debtor. The bankruptcy proceeding has not been dismissed.

II. The Court Should Decline to Grant Certiorari for the Reasons Set Forth in Co-Respondents' Brief.

Should this matter not be stayed for any reason with respect to Respondent Medical Staffing Network, Inc., it respectfully adopts and incorporates by reference herein the argument set forth in the section titled "Reasons For Denying The Petition" in the brief submitted by its co-Respondents, Adventist Health System/Sunbelt, Inc., Southwest Volusia Healthcare Corporation d/b/a Florida Hospital Fish Memorial, and Memorial Health Systems, Inc. d/b/a Florida Hospital – Oceanside.

CONCLUSION

Respondent, Medical Staffing Network, Inc., respectfully requests that this Honorable Court stay all proceedings against Medical Staffing Network, Inc. or, alternatively, that it deny certiorari review of this case in its entirety.

Respectfully submitted,

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(3)

Supreme Court, U.S.
FILED

No. 10-77

In The

Supreme Court of the United States

MICHAEL WILLIAMSON,

Petitioner,

v.

ADVENTIST HEALTH SYSTEM/SUNBELT, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the Eleventh Circuit Court of Appeals properly applied the established standard for direct evidence of discrimination in an employment termination case when it affirmed the District Court's summary judgment against Petitioner.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents Adventist Health System/Sunbelt, Inc., Southwest Volusia Healthcare Corporation d/b/a Florida Hospital Fish Memorial, and Memorial Health Systems, Inc. d/b/a Florida Hospital – Oceanside make the following disclosure:

Respondents Adventist Health System/Sunbelt, Inc., Southwest Volusia Healthcare Corporation, d/b/a Florida Hospital Fish Memorial, and Memorial Health Systems, Inc., d/b/a Florida Hospital – Oceanside are non-profit entities and therefore do not issue stock. The member and parent corporation of Adventist Health System/Sunbelt, Inc. is Adventist Health System Sunbelt Healthcare Corporation, a non-profit corporation. There is no parent corporation or any publicly-held corporation that owns 10% or more of any stock of these entities.

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STATEMENT

Even a cursory review of the opinion below and the Petition for Writ of Certiorari makes clear that the legal issue posed by Petitioner is not presented by this case. The question presented by Petitioner is based on a mischaracterization of the facts and the assertion of a split in circuit court authority which does not exist. The Petition seeks mere error correction where there was no error below. A brief response is warranted, however, to correct Petitioner's mischaracterization of the facts and the decisions of this Court and other federal courts of appeal. A proper evaluation of this case clearly shows that certiorari should be denied.

I. Relevant Facts

Petitioner, an African-American former employee of Medical Staffing Network, Inc. ("MSN"), was temporarily assigned by MSN to perform duties as a Licensed Practical Nurse ("LPN") at MSN clients Memorial Health Systems, Inc., d/b/a Florida Hospital – Oceanside ("Oceanside") and Southwest Volusia Healthcare Corporation, d/b/a Florida Hospital Fish Memorial ("Fish Memorial"), which are subsidiaries of Adventist Health System/Sunbelt, Inc. ("AHS"). Petitioner's App. B, 12a.

On July 3, 2006, Petitioner was assigned by MSN to work at Oceanside. Petitioner's App. B, 12a. Upon arriving at Oceanside and learning of his assignment by Charge Nurse Helen Turk ("Turk") to Patient Care Tech duties, Petitioner refused to accept the assignment. Petitioner's App. B, 21a. Petitioner alleges that Turk then asked him "Who do you think you are?" and refused to sign his MSN time slip, stating something to the effect of "get out

of here, you nigger." Petitioner's App. B, 21a. Turk denies making any racial slur, Petitioner's App. B, 21a, fn.3. There is no record evidence that Turk was the decisionmaker regarding Petitioner's future assignments at Oceanside. Petitioner's refusal to perform the duties which he was assigned provided Oceanside a legitimate, non-discriminatory reason to not request him again from MSN. There is no record evidence that Oceanside retained temporary nurses outside of Petitioner's protected class after they refused a staffing assignment. Respondents' App. A, 9.

Immediately after Petitioner's July 3, 2006 assignment at Oceanside, MSN assigned him to LPN duties at Fish Memorial. Petitioner alleges that during his assignment to Fish Memorial, the Director of the Medical Surgical Department, Jean Kaster ("Kaster"), addressed him on approximately three occasions by saying, "Hey, Mon" and joking about him coming from a "banana boat." Petitioner's App. B, 24a.

On July 26, 2006, Petitioner was assigned to work at Fish Memorial. Early in Petitioner's shift, a physician, Dr. Hood, instructed Petitioner to change a patient's medication to an anti-coagulate. *Id.* Petitioner needed to obtain the new medication from the hospital pharmacy and administer it as soon as possible. *Id.* The order was not filled by the end of Petitioner's shift. *Id.* Petitioner admitted that his failure to timely obtain and administer the medication was a critical medical error. There is no record evidence that any similarly-situated employee outside of Petitioner's protected class was treated differently under similar circumstances. Respondents' App. A, 10.

On July 28, 2006, an MSN representative contacted Petitioner and informed him that Dr. Hood was upset with his failure to obtain the medication. *Id.* Fish Memorial requested that MSN no longer assign Petitioner to that hospital. Petitioner's App. B, 24a-25a.

II. Litigation History

On January 7, 2008, Petitioner filed a Complaint against MSN and Respondents in the United States District Court for the Middle District of Florida, Orlando Division, alleging that he was terminated from employment because of his race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et. seq.* Petitioner's App. B. Petitioner also alleged that Respondents intentionally interfered with his employment contract with MSN in violation of 42 U.S.C. § 1981.

On May 18, 2009, the district court granted MSN's and Respondents' Motions for Summary Judgment. The district court examined the merits of Petitioner's allegations against Oceanside under Section 1981 and Title VII that the Charge Nurse (Turk) would not sign what appeared to be Petitioner's time sheet after he refused to perform Patient Care Tech duties and told Petitioner, "Get out of here, I'm not signing anything, you stupid nigger." Petitioner's App. B, 21a. The court held that Oceanside was entitled to summary judgment on the merits because there was no evidence that the charge nurse singled Petitioner out for reassignment to Patient Care Tech duties because of his race, and because Petitioner's refusal to perform the duties to which he was assigned was sufficient to establish that Oceanside would have requested his

reassignment even in the absence of the alleged discriminatory animus. Petitioner's App. B, 22a.

The district court examined the merits of Petitioner's Title VII and Section 1981 claims against Fish Memorial that the Director of the Medical Surgical Department (Kaster) allegedly had addressed Petitioner on approximately three occasions by saying, "Hey, mon," and joked about him coming from a "banana boat," and that Petitioner allegedly had overheard Kaster, while speaking on the telephone, say, "That Jamaican boy, who does he think he is." Petitioner's App. B, 24a. The court held that Fish Memorial was entitled to summary judgment on the merits because Kaster's remarks – "Hey, mon," and "banana boat," and calling him a "Jamaican boy" – did not constitute direct evidence of discrimination because the remarks did not explicitly demonstrate an intent to discriminate against Petitioner and were not made in connection with any employment decision regarding Petitioner. Petitioner's App. B, 25a.

The court further held that Petitioner could not establish a prima facie case of discrimination through circumstantial evidence because there is no evidence that any employee from outside of his protected class was treated more favorably under similar circumstances. Petitioner's App. B, 25a.

Petitioner appealed the district court's order to the United States Court of Appeals for the Eleventh Circuit. Petitioner argued that summary judgment was inappropriate because there was allegedly direct evidence of racial discrimination at Oceanside and Fish (i.e., "an Oceanside supervisor calling him a 'nigger' after he refused to perform assigned duties,

and a Fish supervisor's references to his Jamaican heritage")

In its decision, the court explained that direct evidence of discrimination is "evidence which reflects a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee.'" Respondents' App. A., 8. The court further explained that "to qualify as direct evidence of discrimination, we require that a biased statement by a decision-maker be made concurrently with the adverse employment event, such that no inference is necessary to conclude that the bias necessarily motivated the decision." Respondents' App. A, 8. Applying its direct evidence standard to Petitioner's evidence, the court concluded that Petitioner did not meet that standard (or the standard applied to Petitioner's circumstantial evidence) and affirmed summary judgment in favor of Respondents on all of Petitioner's claims. Respondents' App. A, 10.

REASONS FOR DENYING THE PETITION

I. The Eleventh Circuit's Direct Evidence Standard Does Not Conflict With Other Federal Circuit Courts

Petitioner erroneously asserts that there is a split in the federal courts of appeal regarding the standard for direct evidence of discrimination in an employment termination case. Petitioner claims that the position taken by the Eleventh Circuit that "derogatory racial, ethnic or national origin remarks in the workplace do not constitute direct evidence of racial discrimination unless the supervisor/employer expressly and directly states that he/she is terminating an employee due to his race, ethnicity or national [sic]" (Petitioner's Brief, 12) is in conflict

with decisions of the Fourth and Seventh Circuits and the United States Supreme Court. In support of this contention, Petitioner cites *White v. BFI Waste Servs.*, 375 F.3d 288 (4th Cir. 2004); *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 182 (4th Cir. 2001); *Rogers v. Western-Southern Life Ins. Co.*, 12 F.3d 668 (7th Cir. 1993); and *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987). None of these cases supports Petitioner's allegation that the federal circuit courts apply a different standard for direct evidence in employment termination cases. Instead, Petitioner seeks to have the standard used by the federal circuit courts in hostile work environment cases applied to this employment termination case.

Petitioner also misstates the proposition cited by the Eleventh Circuit in holding that his evidence was not "direct evidence" of discrimination. In affirming the ruling of the district court, the Eleventh Circuit stated that "[a] biased statement, separate in time from the employment decision under challenge, is not direct evidence of discrimination. Absent this level of proof, the fact-finder is asked to infer that the racially-biased attitude revealed by the statement was what motivated the prior (or subsequent) employment decision, and the evidence is not direct evidence." Respondents' App. A, 8a.

The Eleventh Circuit has consistently held that direct evidence must establish discriminatory intent without inference or presumption. *Standard v. A.B.E.L. Servs.*, 161 F.3d 1318, 1330 (11th Cir. 1998) ("Direct evidence is evidence that establishes the existence of discriminatory intent behind the employment decision without any inference or presumption."); *Merritt v. Dillard Paper Co.*, 120

F.3d 1181, 1189 (11th Cir. 1997) ("We have defined direct evidence as 'evidence, which if believed, proves existence of fact in issue without inference or presumption.'") (quoting *Rollins v. TechSouth*, 833 F.2d 1525, 1528 n.6 (11th Cir. 1987)); *Carter v. City of Miami*, 870 F.2d 578, 581-582 (11th Cir. 1989) ("Direct evidence of discrimination would be evidence which, if believed, would prove the existence of a fact without inference or presumption.").

There is no conflict between the circuit courts regarding the standard for direct evidence of discrimination. Every circuit court which has addressed this question has held that evidence which requires an "inference" that discrimination was the motive for a discharge is not direct evidence, and that to constitute direct evidence of discriminatory intent statements must be made contemporaneous to the discharge. *See Haddon v. Executive Residence at the White House*, 313 F.2d 1352, 1359 (Fed. Cir. 2002) ("All the evidence pointed to by [Plaintiff] requires some inferences to get at a retaliatory motive for his discharge and does not qualify as direct evidence."); *Rios-Jimenez v. Principi*, 520 F.3d 31, 40 (1st Cir. 2008) (direct evidence of discrimination "does not include stray remarks in the workplace, particularly those made by nondecisionmakers or statements made by decisionmakers unrelated to the decisional process itself."); *Fisher v. Vassar College*, 70 F.3d 1420, 1450 (2d Cir. 1995) (holding that a plaintiff may establish a claim of discrimination through "direct evidence, such as statements by the employer that age was the reason for the discharge, ***or*** through proof of circumstances from which an *inference* of age discrimination may be drawn" (emphasis added)); *Josey v. John R. Hollingsworth Corp.*, 996 F.2d 632,

638 (3d Cir. 1993) (where direct "smoking gun" evidence of discrimination is unavailable, Circuit has found that the proper inquiry is whether the evidence offered "reasonably could support an *inference* that the employer did not act for non-discriminatory reasons" (emphasis added)); *O'Connor v. Consolidated Coin Caterers Corp.*, 56 F.3d 542, 548 (4th Cir. 1995) ("'Direct evidence of discrimination is evidence which, if believed, would prove the existence of a fact . . . without any inference or presumptions.'") (quoting *Bodenheimer v. PPG Indus.*, 5 F.3d 955, 958 (5th Cir. 1993)), *rev'd on other grounds*, 517 U.S. 308 (1996); *Jones v. Robinson Prop. Group*, 427 F.3d 987, 992 (5th Cir. 2005) (direct evidence is evidence which proves the fact without inference or presumption); *Goller v. Ohio Dep't of Rehab. & Correction*, 285 Fed. Appx. 250, 255, 2008 WL 2796080, at *4 (6th Cir. July 18, 2008) (derogatory racial slurs were not direct evidence of discrimination because "a significant inference would be required for a factfinder to conclude that . . . racial animosity motivated [the] decision to terminate"); *Robin v. Espo Engineering*, 200 F.3d 1081, 1089 (7th Cir. 2000) (in order for allegedly discriminatory remarks to qualify as direct evidence of discrimination, plaintiff must show that the remarks were related to the employment decision in question; court refused to "read invidious intent into isolated comments"); *Stephens v. Erickson*, 569 F.3d 779, 787 (7th Cir. 2009) (holding that direct evidence typically requires an actor's admission of discriminatory animus, but that a plaintiff may also prevail "by constructing a convincing mosaic of circumstantial evidence that allows a jury to *infer* intentional discrimination . . . ." (emphasis added)); *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328,

1337 (8th Cir. 1996) (dismissing discrimination claims because plaintiff produced neither direct evidence of discrimination nor "sufficient circumstantial evidence for a reasonable factfinder to *infer* that [plaintiff's protected status] 'actually motivated' his employer's decision to discharge him"); *Stegall v. Citadel Broadcasting Co.*, 350 F.3d 1061, 1066 (9th Cir. 2004) ("'Direct evidence is evidence which, if believed, proves the fact [of discriminatory animus] without *inference* or presumption.'" (emphasis added)) (quoting *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998)); *Sanders v. Southwestern Bell Tel.*, 544 F.3d 1101, 1105 (10th Cir. 2008) ("Direct evidence is evidence from which the trier of fact may conclude, without *inference*, that the employment action was undertaken because of the employee's protected status." (emphasis added)).

II. The Circuit Court Cases Cited by Petitioner Do Not Address the Direct Evidence Standard for Employment Termination Cases

All of the circuit court cases cited by Petitioner involve circumstantial evidence, rather than direct evidence, and harassment/hostile environment claims, rather than employment termination claims. In *White v. BFI Waste Servs.*, 375 F.3d at 297, a case involving harassment and a hostile work environment, the court reversed the lower court's grant of the employer's summary judgment motion, holding that evidence of the repeated use (as opposed to only on a few occasions) of the terms boy, jigaboo, nigger, porch monkey, Mighty Joe Young and Zulu Warrior was sufficient to create a triable issue of fact on the plaintiff's hostile environment claims.

Likewise, in *Spriggs v. Diamond Auto Glass*, 242 F.3d at 182, 185-86, the court reversed the lower court's grant of summary judgment for the employer finding that a white supervisor's "incessant racial slurs, insults, and epithets," vilification of "anyone of African descent," including other employees and customers whom he called "niggers" or "monkeys," and referring to his own wife, who was African-American, as a "black bitch" was sufficient evidence of a racially hostile environment to withstand summary judgment. In *Rogers v. Western-Southern Life Ins. Co.*, 12 F.3d at 671, 675-76, the Seventh Circuit affirmed a verdict in favor of the plaintiff in a racially hostile environment case where his supervisor used the word "nigger" twice in plaintiff's presence, stated that "you black guys are too f__king dumb to be insurance agents," and advised plaintiff that his boss had told him not to hire any more black agents.

In addition, in *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, this Court did not address whether racial comments constitute direct or circumstantial evidence, as Petitioner suggests. Instead, the Court simply held that § 1981 applies to an individual alleging race discrimination by virtue of his Arab ancestry. Petitioner asserts that "contrary to the Eleventh Circuit's contention, national origin discrimination was actionable under Petitioner's causes of action regardless of whether the subject comments were deemed racial." Petitioner's Brief, 20. Petitioner further asserts that [t]he Eleventh Circuit accepted the district court's determination that the statements were 'jokes' and further questioned whether the statements were racially discriminatory." Petitioner's Brief, 20. These assertions are a total mischaracterization of

the Eleventh Circuit's decision. The Eleventh Circuit stated that even if the statements were to be considered race-based, they "do not rise to the level of direct evidence under our precedent, as the fact-finder would have to infer from these comments that the supervisor's inappropriate racial attitudes motivated her decision to request that Petitioner no longer be assigned to Fish." Respondents' App A, 9.

Petitioner has not provided any argument or case authority that raises any legitimate question regarding the standard applied by the Eleventh Circuit for direct evidence in an employment termination case.

CONCLUSION

Petitioner's Petition for Writ of Certiorari should be denied because Petitioner has not raised an issue warranting the grant of certiorari.

Respectfully submitted.

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AUGUST 13, 2010

APPENDIX

APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED APRIL 13, 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-12936
Non-Argument Calendar

D.C. Docket No. 08-00032-CV-ORL-31-GJK

MICHAEL WILLIAMSON,

Plaintiff-Appellant,

versus

ADVENTIST HEALTH SYSTEM/SUNBELT, INC., A Florida Non Profit Corporation, SOUTHWEST VOLUSIA HEALTHCARE CORPORATION, A Florida Non Profit Corporation, d.b.a. Florida Hospital Fish Memorial, MEMORIAL HEALTH SYSTEMS, INC., A Florida Non Profit Corporation, d.b.a. Florida, Hospital – Oceanside, MEDICAL STAFFING NETWORK, INC., a Foreign for Profit Corporation,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(April 13, 2010)

Appendix A

Before DUBINA, Chief Judge, BLACK and PRYOR, Circuit Judges.

PER CURIAM:

Appellant Michael Williamson appeals from the district court order granting summary judgment in favor of all defendants on his race discrimination in employment claims, brought under 42 U.S.C. § 2000e-2 and 42 U.S.C. § 1981. In a two-count complaint, Williamson, a Jamaican-born black male, charged that he suffered race-based discrimination in employment at two separate hospitals where he worked as a temporary licensed practical nurse. After reviewing the briefs and the record, we affirm the district court order granting summary judgment in favor of the defendants.

I.

Pursuant to his contract with defendant Medical Staffing Network, Inc. ("MSN"), Williamson received temporary nursing assignments with defendants Florida Hospital-Oceanside ("Oceanside") and Florida Hospital Fish Memorial ("Fish"), in June and July 2006. Oceanside and Fish are subsidiaries of Advent Health System/Sunbelt, Inc, ("AHS"). Williamson charged in his complaint that Oceanside and Fish discriminated against him because of his race, and sued each of the defendants for the alleged violations of federal law.

Williamson contends that Oceanside effectively terminated his employment after he

refused to perform janitorial duties. He contends he was the subject of a racial epithet before Oceanside refused his future assignments to the hospital. Williamson contends that supervisors at Fish commented on his race and national origin more than once, and ultimately declined further assignments for him at the hospital because of his admitted failure to procure prescribed medicine for a patient during his shift. Williamson asserts that other permanent, non-minority nurses were not terminated when their performance was deficient.

Williamson alleges that AHS, as the controlling shareholder of subsidiaries Oceanside and Fish, exercised control over these entities and should be liable for their discriminatory conduct. The record evidence, however, consists only of sworn statements by AHS's in-house counsel and vice president of human resources, stating that even though AHS is the corporate parent of both Oceanside and Fish, the hospitals operate independently. They have their own corporate officers, board of directors, and human resources departments. Williamson also argues that MSN is liable for the racial discrimination in its role as a temporary staffing agency.

II.

We review a district court order granting summary judgment *de novo*, viewing all of the facts in the record in the light most favorable to the non-moving party. *Brooks v. County Comm'n of Jefferson County, Ala.*, 446 F.3d 1160, 1161-62 (11th Cir.

2006). Summary judgment is appropriate where the moving party demonstrates, through "pleadings, the discovery and disclosure materials on file, and any affidavits," that no issue of material fact exists, and it is "entitled to judgment as a matter of law." Fed. R. Civ. P 56(c).

III.

Williamson first argues that MSN is liable for its role in the discrimination inflicted by Fish and Oceanside under a "cat's paw" theory. We have held that a "cat's paw" theory of recovery may apply when a biased actor recommends that an adverse employment action be taken against an employee, but the biased actor is not the ultimate decision-maker. *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999). In such a situation, the employee must provide evidence that the recommender's alleged discriminatory animus directly caused the decision-maker to take adverse employment action against its employee. *Id.* at 1331.

We conclude from the record that the district court did not err in granting summary judgment in MSN's favor. Williamson testified that MSN did not give him any more assignments after Oceanside and Fish requested that he not be assigned to their respective hospitals again, showing that MSN passively acceded to the decisions of Oceanside and Fish in making its own adverse employment decision regarding Williamson. An application of the theory could only be made, however, after it has been

established that either Oceanside or Fish (or both) discriminated against Williamson. That is the essence of a "cat's paw" theory. Because Williamson failed to establish a *prima facie* case of racial discrimination against either Oceanside or Fish, as we conclude below, MSN was entitled to summary judgment on Williamson's "cat's paw" theory. As for direct liability, the district court properly determined that Williamson failed to provide any evidence that MSN itself discriminated against him, and we therefore affirm that ruling.

Williamson next argues that the district court erred in ruling as a matter of law that AHS could not be held liable for the alleged racial discrimination he suffered at Oceanside and Fish. He argues that AHS was his employer under the "economic realities" test, and that it could be held liable for interfering with his contract with MSN because AHS controlled Oceanside and Fish.

In determining whether two businesses should be treated as a joint employer for Title VII purposes, we apply the standards promulgated by the National Labor Relations Board ("NLRB"), which include: "(1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control." *McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 933 (11th Cir. 1987). We have separately adopted the "economic realties" test to determine whether a Title VII plaintiff is an employee of an

defendant business entity. *Cuddeback v. Fla. Dep't of Educ.*, 381 F.3d 1230, 1234 (11th Cir. 2004).

The district court's determination that AHS did not exercise control over Oceanside or Fish sufficient to impute liability for their alleged discriminatory actions is fully supported by the undisputed factual record. Williamson's bare assertions of corporate control do not negate the actual record evidence to the contrary. The undisputed facts preclude a finding that AHS was Williamson's employer under the NLRB standard or the "economic realities" test. They also establish Oceanside and Fish were operating as independent decision-makers in personnel matters, precluding any argument for liability against AHS under a "cat's paw" theory. Summary judgment in AHS's favor was therefore proper.

Williamson lastly argues that he provided direct and circumstantial proof of racial discrimination by Oceanside and Fish, and that the district court therefore erred in granting summary judgment in their favor. As direct evidence, Williamson cites an Oceanside supervisor calling him a "nigger" after he refused to perform certain assigned duties, and a Fish supervisor's references to his Jamaican heritage. Williamson relies on this same evidence as proof, under a circumstantial case analysis, that the hospitals' proffered non-discriminatory reasons were pretextual.

Title VII makes it unlawful for an employer "to discharge any individual, or otherwise to

discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). When a plaintiff uses circumstantial evidence in an attempt to prove discrimination or retaliation under Title VII, we may apply the burden shifting approach articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *Crawford v. Carroll*, 529 F.3d 961, 975–76 (11th Cir. 2008). Under the *McDonnell Douglas* framework, a plaintiff has the initial burden to establish a *prima facie* case of discrimination. *Crawford*, 529 F.3d at 976. To establish a *prima facie* case of discrimination under Title VII, a plaintiff must show that "(1) he is a member of a protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) he was . . . treated less favorably than a similarly situated individual outside his protected class." *Maynard v. Bd. of Regents of Div. of Univs. of Fla. Dep't of Educ.*, 342 F.3d 1281, 1289 (11th Cir. 2003). "To show that employees are similarly situated, the plaintiff must show that the employees are similarly situated in all relevant respects . . . ." *Knight v. Baptist Hosp. of Miami, Inc.*, 330 F.3d 1313, 1316 (11th Cir. 2003) (internal quotation marks omitted).

Once the plaintiff has made out the elements of the *prima facie* case, the employer must articulate a non-discriminatory basis for its employment action. *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1361, (11th Cir. 1999). If non-

discriminatory reasons are identified, the plaintiff must then show that the proffered reasons were pretextual. *Id.*; *Crawford*, 529 F.3d at 976. Specifically, to survive summary judgment, the employee must come forward with evidence sufficient to permit a reasonable fact finder to conclude that the legitimate reasons given by the employer were not its true reasons, but were a pretext for discrimination. *Chapman v. AI Transp.*, 229 F.3d 1012, 1024 (11th Cir. 2000) (*en banc*).

A plaintiff may, however, establish a *prima facie* case of discrimination through direct evidence. *Damon*, 196 F.3d at 1358. We have defined direct evidence "as evidence which reflects a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee." *Id.* (internal quotation marks omitted). "[T]he evidence must indicate that the complained-of employment decision was *motivated* by the decision-maker's [racial animus]." *Id.* at 1358-59 (emphasis in original). To qualify as direct evidence of discrimination, we require that a biased statement by a decision-maker be made concurrently with the adverse employment event, such that no inference is necessary to conclude that the bias necessarily motivated the decision. *See id.* at 1359.

The district court properly granted summary judgment in Oceanside's favor. Under our precedent, the Oceanside supervisor's alleged racial epithet does not constitute direct evidence of discrimination. A biased statement, separate in time from the

employment decision under challenge, is not direct evidence of discrimination. *See id.* Absent this level of proof, the fact-finder is asked to infer that the racially-biased attitude revealed by the statement was what motivated the prior (or subsequent) employment decision, and the evidence is not direct evidence.

The district court's summary judgment ruling as to Oceanside was likewise correct under a circumstantial case analysis. Williamson's refusal to perform the duties to which he was assigned provided a legitimate, non-discriminatory reason for Oceanside to not request him again, and Williamson provided nothing to show that this proffered reason was unworthy of credence, or otherwise pretextual. Moreover, Williamson did not offer any evidence that a non-black temporary licensed practical nurse or registered nurse was retained after refusing a staffing assignment.

The district court's summary judgment ruling as to Fish also was correct. The evidence primarily relied upon by Williamson regarding Fish consisted of references or jokes by a supervisor about his Jamaican heritage, occurring both before and after his final shift there. Even if considered race-based, however, these alleged comments do not rise to the level of direct evidence under our precedent, as the fact-finder would have to infer from these comments that the supervisor's inappropriate racial attitudes motivated her decision to request that Williamson no longer be assigned to Fish.

Appendix A

For purposes of a circumstantial analysis, the critical medication error, which Williamson admitted to during his final shift at Fish, provided a legitimate, non-discriminatory reason for Fish to ask that he not be assigned there again. Williamson provided nothing to show that this proffered reason was unworthy of credence or was pretextual. Williamson also failed to show that any similarly-situated employee outside of his protected class was treated differently under similar circumstances. We conclude that summary judgment in Fish's favor was therefore appropriate.

IV.

For the aforementioned reasons, we affirm the district court order granting summary judgment in favor of the defendants on all of Williamson's claims.

AFFIRMED.